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No. 06-1038

IN THE

Supreme Court of the United States

MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, INC.,
Petitioner,

v.

COMMUNITIES FOR EQUITY ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Whether the Sixth Circuit properly ruled, based on the district court's detailed findings of fact, that the Michigan High School Athletic Association's scheduling of girls' sports only in disadvantageous seasons violates the Fourteenth Amendment's Equal Protection Clause, Title IX, and Michigan's Elliott-Larsen Civil Rights Act.

(2) Whether this Court should address MHSAA's argument that plaintiffs' equal protection claim is displaced by Title IX given that the lower courts have already correctly held that MHSAA violated Title IX as well as state law.

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INTRODUCTION AND SUMMARY OF ARGUMENT

This case arises in a distinctive factual and procedural scenario. It was initially brought as a broad based challenge to practices of the Michigan High School Athletic Association ("MHSAA") that discriminate against girls. After the district court entered a Consent Decree that settled numerous claims, see Consent Decree in Case No. 1:98-CV-479, Dec. 17, 2004 (W.D. Mich.), the case went to trial on one of the discriminatory practices: the scheduling of six girls' sports, and no boys' sports, in nontraditional, disadvantageous seasons.[1]

After trial, the district court held that MHSAA violated the Fourteenth Amendment's Equal Protection Clause, Title IX of the Education Amendments Act of 1972, and Michigan's Elliott-Larsen Civil Rights Act ("ELCRA"), by scheduling girls' sports only in nontraditional or disadvantageous seasons and causing substantial harm to girls, without legally sufficient justification for the discriminatory treatment. Specifically, the court concluded that MHSAA had failed to demonstrate that its discriminatory scheduling was "substantially related" to the achievement of the state's alleged logistical and other objectives, and that even if MHSAA had proven that its scheduling decisions furthered those objectives, "that would not justify forcing girls to bear all of the disadvantageous playing seasons alone to solve the logistical problems." Pet. App. 147a.

In its initial opinion in this case, the Sixth Circuit affirmed the district court's determination that MHSAA violated the Fourteenth Amendment. After this Court remanded the case so that the Court of Appeals could consider the potential application of *City of Rancho Palos Verdes v. Abrams*, 544

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[1] The Consent Decree addressed publicity, additional tournaments for girls, volleyball and golf rules, fast-pitch softball finals and tournament facilities, and girls' basketball tournament sites.

U.S. 113 (2005), the Sixth Circuit reaffirmed its decision that MHSAA violated the Fourteenth Amendment, *and* affirmed the district court's alternate holdings that MHSAA violated Title IX and Michigan's ELCRA. Pet. App. 2a.

This case would be a poor vehicle to decide the equal protection issue MHSAA seeks to raise because its consideration will not change the outcome of this case. The district court found, and the appeals court has affirmed, that MHSAA's scheduling policy violates not only the Constitution, but also Title IX *and* state law. MHSAA seeks to avoid the import of that ruling by claiming that the tests for violation of Title IX and the ELCRA are no different than its test for a violation of the Equal Protection Clause. Practices such as disadvantageous playing seasons, however, violate Title IX when the harms are substantial enough to deny equal participation opportunities in athletics to students of one sex -a finding made by the trial court here. See, *e.g.*, *Title IX of the Education Amendments of 1972; A Policy Interpretation; Title IX and Intercollegiate Athletics*, 44 Fed. Reg. 71413, 71418 (Dec. 11, 1979) (codified at 45 C.F.R. Pt. 86) ("*Policy Interpretation*"). No "animus" towards the disadvantaged sex is required. And, with respect to the ELCRA, any similarity in the tests does not alter the fact that there is an independent state law ground for the decision below. Indeed, the Michigan Supreme Court has stated that the ELCRA does not "create a standard *less* protective than the constitutional test developed by the courts in the course of interpreting the equal protection provisions of *both the Michigan and the United States Constitutions*." *Dept. of Civil Rights ex rel. Forton v. Waterford Twp. Dept. of Parks and Rec.*, 425 Mich. 173, 186-87 (1986) (emphasis added).[2]

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[2] In fact, the Michigan Supreme Court emphasized that if the Michigan Constitution "requir[es] a stricter standard than that established under the Fourteenth Amendment, it goes without saying that the standard to be

Moreover, the decisions below, holding that MHSAA's discriminatory scheduling policies violate the Fourteenth Amendment, are entirely consistent with this Court's precedents and do not conflict with decisions from other circuits. Heightened scrutiny is applied to gender-based classifications that harm, and may therefore be challenged by, a plaintiff. *United States* v. *Virginia*, 518 U.S. 515 (1996) ("*VMI*"). MHSAA's argument that its explicit scheduling of girls' seasons differently from boys' seasons is not a facial gender classification was rightly rejected by the Court of Appeals. Its scheduling is the essence of a facial classification—MHSAA has defined the seasons in which each team will play by the sex of the team's members. Neither logic nor precedent supports MHSAA's claim that because the scheduling of seasons is one aspect of a separate sex program, it is no longer a facial gender classification.

MHSAA's additional contention that *VMI* stands for the proposition that separate-sex programs violate equal protection only if the programs as a whole are substantially unequal misreads the case and is equally meritless. If a plaintiff challenges an entire program, the court will examine the entire program. If a plaintiff challenges only one aspect of a program, that is all that a court need examine. The nature of the rest of the program will not change the analysis. See, *e.g.*, *Califano* v. *Goldfarb*, 430 U.S. 199 (1977). Under the heightened scrutiny standard, the defendant must show that the particular sex-based classification that is challenged has an exceedingly persuasive justification and is substantially related to the achievement of important governmental objectives.

MHSAA put the boys in the seasons that they and their coaches wanted and gave the girls the leftovers. The courts

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applied to gender discrimination cases brought pursuant to the Michigan Civil Rights Act would be altered accordingly." *Id.* at 187 n.4.

below properly found that the girls were harmed by MHSAA's actions, and that it had not met its burden of justifying them under the Equal Protection Clause. MHSAA's claims below that its actions were justified because of the benefits of playing in nontraditional seasons are particularly unconvincing in light of its strenuous resistance during the near decade it has litigated this case to conferring these "benefits" on boys.

The Sixth Circuit's decision in no way conflicts with the decisions of this Court or those of other courts of appeals. This case thus presents a routine application of this Court's legal standards governing equal protection to record facts that are unique and unlikely to recur, and this Court's review is unwarranted.

Finally MHSAA's argument that the § 1983 claim is displaced by Title IX—improperly made for the first time in MHSAA's 2005 petition for certiorari to this Court—is also irrelevant to the outcome here.[3] If § 1983 were ousted by Title IX, plaintiffs would nonetheless prevail because the district court found, and all members of the Sixth Circuit panel agreed, that MHSAA violated Title IX and state law. In any event, the Sixth Circuit correctly found that Congress did not intend Title IX, which provides no express private remedy let alone a comprehensive private enforcement scheme, to displace plaintiffs' constitutional right to equal protection enforced under § 1983. No other court of appeals has yet had the opportunity to reconsider its decision on the relationship between Title IX and § 1983 in light of *Rancho Palos*.

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[3] MHSAA also petitioned for certiorari in 2000, seeking interlocutory review of the denial of its motion for summary judgment. That petition was denied.

STATEMENT OF THE CASE

1. Since the 1920s, MHSAA has supervised and controlled interscholastic athletics in Michigan. In this role, it regulates almost every aspect of sports in the state, including the area most pertinent to this case—the season in which each sport will be played. Pet. App. 76a-82a. When MHSAA began to sanction and regulate sports for girls in the 1970s, it followed the above "boys-first" philosophy and scheduled the girls' seasons in the months when boys were not playing. See *id.* at 83a-84a (statement by MHSAA's Executive Director that "'Boys' sports were in [MHSAA member] schools first and girls' sports, which came later, were fitted around the pre-existing boys' program'") (alteration in original). This philosophy also extended to sports that were contemporaneously sanctioned for boys and girls, such as soccer. *Id.* at 83a.

As a result, MHSAA now schedules the seasons for all twelve boys' sports it sanctions during the traditional or most advantageous times of the year, while it schedules six girls' sports during nontraditional or disadvantageous times that are harmful to girls. Specifically, while MHSAA schedules boys' basketball in the traditional, advantageous winter season along with every other state and college in the nation, it schedules girls' basketball in the fall season. It schedules boys' soccer in the traditional fall season, but girls' soccer in the spring. It schedules boys' tennis in the traditional spring season, but girls' tennis in the fall. It schedules boys' swimming in the traditional winter season, but girls' swimming in the fall. It schedules boys' golf in the fall, but girls' golf in the spring.[4] And it is the only state athletic association in the nation that

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[4] While MHSAA previously scheduled boys' golf in the traditional spring season, it moved the boys to the fall season in 1975 because it is easier to obtain tee times and better courses in the fall due to weather conditions. When MHSAA began sanctioning girls' golf, it set spring as their season, having previously determined that it was less advantageous. Pet. App. 55a.

schedules girls' volleyball in the winter instead of the traditional fall season. Pet. App. 52a-56a.

MHSAA was aware that its "boys-first" scheduling negatively affected girls' athletic opportunities and that it could be held legally liable for this discriminatory treatment. Indeed, in the early 1990s, MHSAA studied changes to its scheduling of seasons "'mostly to do what is needed for girls, but also in part to keep the MHSAA in a position of choosing its future voluntarily rather than being forced to fight legislated or court-ordered changes in the future if something is not done soon.'" However, it made no changes. Pet. App. 87a.

2. Plaintiffs Communities for Equity (an organization founded by parents and students to promote gender equity in athletics) and individual parents on behalf of their daughters sued MHSAA in 1998. They alleged that MHSAA discriminates against girls in numerous ways, including the scheduling of sports seasons, in violation of (1) the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution (as enforced through 42 U.S.C. § 1983); (2) Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681 *et seq.*); and (3) the Elliott-Larsen Civil Rights Act of Michigan state law (M.C.L.A. § 37.2301 *et seq.*). Specifically, plaintiffs alleged that MHSAA required females but not males to play sports in nontraditional or disadvantageous seasons; operated shorter athletic seasons for girls for certain sports; scheduled girls' competitions at times and places inferior to those for boys; provided, assigned, and operated inferior athletic facilities for girls to use for MHSAA-sanctioned games; and allocated more resources to the support and promotion of boys' interscholastic athletic programs. See Complaint, June 26, 1998. Before trial, the parties settled all claims through a court enforced Consent Decree, except the one involving seasons.

In December 2001, after a trial in which the United States participated as litigating amicus in support of the plaintiffs,

the district court ruled in favor of plaintiffs on all three legal claims. The district court's ruling spans almost 100 pages, over 30 of which detail findings of fact about the multiple and significant harms girls suffer as a result of MHSAA's discriminatory scheduling of seasons. Pet. App. 88a-126a. For example, the court made factual findings that Michigan girls: (1) lose opportunities to be recruited by college coaches and receive athletic scholarships; (2) lose opportunities to participate in Olympic Development Programs and national club sport programs (*e.g.*, female volleyball players lose 16-20 months of club playing time over a four-year career); (3) have shorter seasons in some girls' sports by as much as 21 days (resulting in less practice time, skill development, and coaching); (4) lose opportunities to participate in special events like March Madness and fall blue-chip basketball shoot-outs; (5) miss out on national publicity, rankings, and All-American honors; (6) lack contemporaneous college and professional role models; (7) cannot compete against teams in neighboring states, which could lessen travel burdens; and (8) endure psychological harm from being treated like "second-class" citizens, resulting in low self-esteem and low life expectations. *Id.* at 122a-125a.[5]

The district court recognized that the state had an important interest in "[e]nsuring the greatest number of participation opportunities for children in interscholastic sports," Pet. App. 127a, but held that MHSAA had failed to present sufficient evidence that logistical limitations require separate seasons

[5] MHSAA's petition (pp. 6-10) simply repeats its evidence that the scheduling decisions were not disadvantageous or harmful to girls. On pp. 5-6 of its petition, MHSAA also belittles the disadvantages of discriminatory scheduling. But the district court's findings of fact were to the contrary, and these findings support its determination that MHSAA violated Title IX and state law as well as the Equal Protection Clause. This Court does not grant review based on disagreement with a district court's factual findings.

for the sexes to maximize participation. See *id.* at 126a ("MHSAA presented insufficient evidence in all of the sports at issue that logistical concerns could not be resolved if both sexes played in the same season").[6] The court similarly found that MHSAA's argument that Michigan girls preferred the extant seasons was unsupported by the evidence and based on an inadequate and biased post hoc survey. See *id.* at 126a-127a.[7]

Expressly applying the standard set forth in *VMI*, the court found that MHSAA "intentionally treats boys and girls differently by scheduling their interscholastic sports seasons at different times of the year." Pet. App. 142a. The court found that MHSAA's logistics and participation-based objectives were important, but "conclude[d] that the discriminatory scheduling is not 'substantially related' to the achievement of those asserted objectives. The empirical evidence was wholly insufficient." *Id.* at 147a. Further, the court held that "[e]ven assuming that the MHSAA had sufficiently proven this point, that would not justify forcing girls to bear all of the disad-

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[6] MHSAA's petition does not respect this finding of fact. For example, on p. 3, MHSAA states that its scheduling decisions "allow[] schools with limited facilities or coaching resources to avoid resource conflicts and offer a better program to all students." And MHSAA repeatedly claims that its season-scheduling has "been very successful at promoting participation," Pet. 4, although the district court found that Michigan's season scheduling was not a cause of increased participation. *See, e.g.*, Pet. App. 127a ("the Court is not convinced that the MHSAA's scheduling system maximizes participation"); *id.* at 127a-131a (rejecting MHSAA's evidence on this point). Thus, MHSAA's statement (Pet. 25) that it has "[a] schedule designed to maximize overall participation" is contrary to the district court's factual findings.

[7] In its petition (p. 20), MHSAA relies on this survey purporting to show that Michigan girls prefer the disadvantageous scheduling. The district court rejected MHSAA's reading of the survey, *see* Pet. App. 133a; noted that "MHSAA did not offer the testimony of any girl or parent who was in favor of keeping the current seasons[,]"; and found the survey suffered from "design flaws and bias." *Id.*

vantageous playing seasons alone to solve the logistical problems." *Id.* And, the court continued, "the logistics justification smacks of post hoc rationalization for a system that only in the relatively recent past decided that girls were entitled to play sports . . . ." *Id.*[8]

In the alternative, the court found that "[p]laintiffs have demonstrated that female high school athletes are denied the benefits of school athletic programs as a result of the scheduling system of [MHSAA] that they would otherwise enjoy if they were male," demonstrating that Title IX had been violated. Pet. App. 155a-156a. Finally, the court determined that MHSAA's discriminatory scheduling of girls' sports seasons violated Michigan's ELCRA. *Id.* at 159a.

Based on these violations, the district court ordered MHSAA to reschedule its sports seasons in compliance with the Constitution, Title IX, and Michigan state law by the 2003-04 school year. Pet. App. 166a-167a. The district court did not order MHSAA to combine girls' and boys' seasons in any sport, but stated that if MHSAA chose to keep separate seasons, it had to schedule them so that boys and girls equitably share the benefits and burdens of different seasons. *Id.* at 167a.

3. The Sixth Circuit affirmed the judgment on the equal protection claim, "thus finding no need to reach the Title IX and state-law issues." Pet. App. 51a. After holding MHSAA to be a state actor, See *Brentwood Acad.* v. *Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001), the court

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[8] The trial court did not need to and therefore did not specifically address whether plaintiffs had shown that MHSAA's scheduling policies reflected discriminatory animus towards girls. The finding, however, that MHSAA's explanation for its disadvantageous scheduling for girls was pretextual comes very close to a finding of animus. In combination with other findings (that the boys' golf season was changed after the boys' coaches complained and pointed to its disadvantages, *see* Pet. App. 55a), this finding is strongly indicative of discriminatory animus.

wholly adopted the district court's factual findings, stating that "the district court painstakingly discussed each sport at issue and analyzed why play in the non-traditional season . . . harmed female athletes." Pet. App. 52a. Next, applying this Court's heightened scrutiny standard consistent with *VMI*, the court examined and rejected MHSAA's main argument that separate seasons maximize athletic participation: "The evidence offered by MHSAA . . . does not establish that separate seasons for boys and girls—let alone scheduling that results in the girls bearing all of the burden of playing during disadvantageous seasons—maximizes opportunities for participation. . . . [A] large . . . participation number alone does not demonstrate that discriminatory scheduling of boys' and girls' athletic seasons is substantially related to the achievement of important government objectives." *Id.* at 64a. Thus, the court held MHSAA had not shown that its discriminatory scheduling was substantially related to an important government objective and, necessarily, that it had not provided an "exceedingly persuasive" justification for its discrimination. *Id.* at 65a.

MHSAA filed a petition for certiorari to this Court, seeking review of the decision that it had violated the Equal Protection Clause on two grounds: First, MHSAA argued for the first time that Title IX is the exclusive remedy for its discriminatory conduct in the scheduling of girls athletic seasons.[9] Second, MHSAA argued that if an action for violation of the Equal Protection Clause under § 1983 could be brought for discriminatory scheduling, then plaintiffs had failed to prove such a violation at trial because they had failed to show intentional discrimination. MHSAA did not seek review of the decision that it had violated Title IX or the ELCRA.

This Court granted the petition, vacated the Sixth Circuit's decision, and remanded the case to the court of appeals with

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[9] MHSAA had previously argued that it was not covered by Title IX, but changed its position to make this argument. Pet. App. 32a.

instructions to further consider the case "in light of our opinion in *Rancho Palos*." 544 U.S. 113 (2005).

On remand, the panel unanimously affirmed the trial court's holdings that MHSAA violated Title IX and the ELCRA, as well as the Fourteenth Amendment. Pet. App. 33a, 35a. The panel majority also held that Title IX does not provide the exclusive remedy for MHSAA's discriminatory scheduling decisions. *Id.* at 33a. The court analyzed this Court's decision in *Rancho Palos* and determined that it had not undermined the reasoning of the Sixth Circuit's earlier decision in *Lillard* v. *Shelby County Bd. of Educ.*, 76 F.3d 716 (6th Cir. 1996), holding that a plaintiff's constitutional claims under § 1983 were not displaced simply because the facts also gave rise to a statutory claim under Title IX. *Id.* at 722-23.

Judge Kennedy concurred in the majority's holding that MHSAA's scheduling of high school athletics seasons violates Title IX and the ELCRA, but dissented from the alternative holding that plaintiffs could seek relief for discriminatory scheduling under the Equal Protection Clause, as enforced through § 1983. Pet. App. 38a.

REASONS FOR DENYING THE WRIT

MHSAA's petition raises two issues: (1) whether the Sixth Circuit properly followed this Court's equal protection analysis, and (2) whether Title IX displaces plaintiffs' § 1983 claim. Neither issue is dispositive of this case and neither warrants this Court's review.

I. THE SIXTH CIRCUIT PROPERLY APPLIED EQUAL PROTECTION LAW AS TO WHICH THERE IS NO CONFLICT IN THE COURTS OF APPEALS.

The trial court found and the court of appeals has now affirmed that MHSAA violated not only the Fourteenth Amendment but also Title IX and state law. It thus makes

little sense for this Court to address the equal protection issue raised by MHSAA. Moreover, MHSAA's claim that this case creates a conflict about the legal standards for addressing the constitutionality of gender-based discrimination is without merit. This Court in *VMI* articulated the standard for scrutiny of claims like those at issue, and the Sixth Circuit properly applied that standard to the facts found by the district court after a bench trial. This case, accordingly, does not warrant review.

A. This Case Is Not An Appropriate Vehicle For Resolution of the First Question Presented.

As noted above, in addition to the violation of the Equal Protection Clause, two alternative grounds support the decisions of the courts below in this case. This Court has made clear that when, as here, the outcome of litigation does not turn on the answer to the question presented, the petition for certiorari should be denied. See, *e.g.*, *Smith* v. *Butler*, 366 U.S. 161 (1961). Where alternative grounds exist that support the same result regardless of the Court's decision on the question presented, this Court has declined review. See *Monrosa* v. *Carbon Black Exp.*, 359 U.S. 180, 184 (1959) ("[w]hile this Court decides questions of public importance, it decides them in the context of meaningful litigation"); see also *Belcher* v. *Stengel*, 429 U.S. 118 (1976) (same).

Deciding the equal protection question presented by MHSAA would not alter the outcome of this litigation because, in addition to holding that MHSAA violated the Equal Protection Clause, the district court held that MHSAA violated both Title IX and Michigan state law.[10] The Sixth

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[10] This Court generally defers to the construction of a state statute given it by the lower courts. *See Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 499 (1985); *Butner* v. *United States*, 440 U.S. 48, 57-58 (1979) (declining to address state law claim because "federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than we to determine how local courts would

Circuit has unanimously affirmed these alternative holdings. This case is thus a very poor vehicle to address MHSAA's equal protection claim.

MHSAA tries to circumvent the importance of these alternative holdings by suggesting that neither the Title IX nor the ELCRA holding would stand if the courts below misapplied *VMI* in finding a violation of the Equal Protection Clause, but that is not the case. Unequal treatment of girls and boys teams violates Title IX, see 20 U.S.C. § 1681(a); Education Programs or Activities, 34 C.F.R. § 106.31(b), unless that treatment does not disadvantage or harm one sex or the harm is "negligible." *Policy Interpretation*, 44 Fed. Reg. at 71415. Indeed, Title IX's regulations expressly require equitable scheduling of athletic practices and competitions. See, *e.g.*, 34 C.F.R. § 106.41(c)(3); *Policy Interpretation*, 44 Fed. Reg. at 71416; *Title IX Athletics Investigator's Manual* (1990), p. 37. It is undisputed that MHSAA schedules boys' and girls' seasons differently, and the trial court's factual findings are that MHSAA's disparate scheduling is harmful to girls in substantial (*i.e.*, non-negligible) ways. Pet. App. 88a-126a. This proves a Title IX violation, as the courts below found. See also *McCormick ex rel. McCormick* v. *School Dist. of Mamaroneck*, 370 F.3d 275 (2d Cir. 2004) (holding that girls, but not boys, playing in nontraditional season violated Title IX).

In addition, there exists an independent state law ground for the trial court's decision: MHSAA's violation of the ELCRA. Plaintiffs adhere to their long standing argument that since MHSAA did not appeal that holding to the Sixth Circuit, they cannot raise it now. In any event, the Sixth Circuit unanimously affirmed the district court's decision that MHSAA's scheduling of girls' sports violates the ELCRA.

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dispose of comparable issues"); *Bishop* v. *Wood*, 426 U.S. 341, 346 n.10 (1976) (explaining that the Court is hesitant to overrule decisions by federal courts skilled in the law of particular states).

This Court's treatment of the equal protection claim would not determine the question whether the ELCRA was violated, see *Forton*, *supra*; and, as plaintiffs demonstrated to the trial court, MHSAA's practices would be deemed a violation of state law. Pet. App. 159a-162a.

B. The Sixth Circuit's Heightened Scrutiny Analysis Comports With *VMI*.

The Sixth Circuit adhered to this Court's heightened scrutiny analysis in *VMI* and properly concluded that MHSAA's scheduling of girls' sports only in disadvantageous seasons violates the Equal Protection Clause.

In *VMI*, this Court was asked to decide whether Virginia's exclusion of women from the educational opportunities offered by the Virginia Military Institute violated the Equal Protection Clause. In answering this question, the Court reiterated the heightened standard that must be met to justify gender-based classifications:

> Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is "exceedingly persuasive." The burden of justification is demanding and it rests entirely on the State. The State must show "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" [518 U.S. at 532-33 (alteration in original) (internal citation omitted).]

The district court and the Sixth Circuit cited and then carefully applied and followed this Court's analysis in holding MHSAA's discriminatory scheduling of girls' seasons to be unconstitutional. These courts found that MHSAA treats boys and girls differently in the scheduling of their sports seasons and that this disparate treatment harms girls in numerous ways. The courts examined MHSAA's justifica-

tions for the disparate scheduling and held that they had not even been proven, much less that they were exceedingly persuasive and substantially related to important government objectives. Therefore, the courts properly concluded that MHSAA's scheduling of girls' seasons violates the Equal Protection Clause. Pet. App. 146a-147a.

C. This Case Presents No Conflict About the Proper Rule of Law That Applies to Gender-Based Classifications.

MHSAA tries to turn its dissatisfaction with the outcome in this case into a conflict about the appropriate analysis of gender-based classifications, but there is no conflict on this issue.

1. *The Sixth Circuit's Decision Does Not Conflict With This Court's Cases Addressing Sex Discrimination Under the Constitution.*

MHSAA's argument that its scheduling of girls' seasons does not constitute a facial gender classification was rejected by all courts below and is wrong. The scheduling decisions at issue are made by MHSAA explicitly on the basis of the sex of the members of the team, not pursuant to a facially-neutral rule.[11] As the courts below held, it is hard to imagine a clearer facial classification. The Sixth Circuit's decision is

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[11] Plaintiffs do not seek to invalidate the separation of sports teams by sex. Indeed, separate sex sports teams have been held constitutionally permissible in the unique context of athletics. *See, e.g., Haffer* v. *Temple Univ.*, 678 F. Supp. 517, 525 (E.D. Pa. 1987) (separate men's and women's teams are permissible because they "expand substantially the opportunity for women to participate"; "courts have repeatedly observed. . . that separate and equal athletic programs are constitutionally permissible") (citing several cases)); *see also O'Connor* v. *Board of Educ.*, 449 U.S. 1301 (1980) (Petition to Stevens, J., Circuit Justice for the Seventh Circuit, to vacate stay) ("Without a gender-based classification in competitive contact sports, there would be a substantial risk that boys would dominate the girls' programs and deny them an equal opportunity to compete . . . .").

thus in complete accord with this Court's treatment of gender-based classifications. See *UAW* v. *Johnson Controls, Inc.*, 499 U.S. 187, 197 (1991) ("[t]he policy [at issue] excludes women with childbearing capacity from lead-exposed jobs, and so creates a facial classification based on gender").

MHSAA contends that only the initial decision to have separate boys' and girls' teams creates a facial gender classification that is subject to heightened scrutiny. Under this theory, a facial gender classification somehow ceases to be a facial gender classification if it is in a program that separates genders. Thus, if a coeducational high school allowed boys, but not girls, to use its science laboratories, that would be a facial gender classification. But, if a school system had separate boys' and girls' high schools, and only the boys' school had science laboratories, that would not be a facial gender classification. The court of appeals correctly concluded that a facial gender classification does not mutate into something else simply because it is part of a single-gender program.

There is also no conflict between the Sixth Circuit's decision and this Court's cases holding that the Equal Protection Clause reaches only purposeful sex discrimination. Facial gender classifications are, by definition, purposeful. Plaintiffs were thus not required to show a specific intent to harm female athletes, discriminatory animus, malice or other evidence of motive. See *Johnson Controls*, 499 U.S. at 199 ("[w]hether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates"). Rather, MHSAA was obligated—but failed—to show an exceedingly persuasive justification for its classification once plaintiffs showed that MHSAA treated girls differently than boys in ways that caused harm to girls in the scheduling of sports seasons.

MHSAA's argument that *VMI* stands for the proposition that the Equal Protection Clause requires only that programs be substantially equal as a whole in their treatment of males

and females is also meritless. Heightened scrutiny has always been applied to the particular aspect of a program that is being challenged. See, *e.g.*, *Califano* v. *Goldfarb*, 430 U.S. 199 (1977) (provision of the Social Security Act that treated nondependent widows and widowers differently held to deny equal protection); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975) (provision of the Social Security Act that provided fewer benefits to male surviving spouses than to female surviving spouses held to deny equal protection); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973) (provision of the statute governing benefits for the armed services that treated female dependents of servicemen more favorably than male dependents of servicewomen held to deny equal protection).

As quoted above, *VMI* itself requires the court to "[f]ocus[] on the differential treatment or denial of opportunity *for which relief is sought*." 518 U.S. at 532-33 (emphasis added). Initially, *VMI* focused on women's exclusion from VMI. Then, when the state proposed to establish a new program that purported to offer equal opportunity for women, this Court looked at all the components of that new program. Here, plaintiffs challenged the disparate treatment in the scheduling of sports seasons, and the courts below properly focused on that scheduling.

MHSAA's theory that violations of the law can be excused by focusing on other parts of a program is thus a serious misreading of this Court's precedent. Schools may not avoid heightened scrutiny of a sex-based classification—such as failing to provide any science laboratories in a girls' school while providing them in a boys' school—by pointing to the caliber of the girls' history teachers.

In addition, this case provides an excellent illustration of why MHSAA's overall equality test makes no sense. Plaintiffs challenged MHSAA's discrimination against girls in numerous aspects of their programs, but many of these challenges were settled in a consent decree. See *supra* at 1.

Under MHSAA's theory, plaintiffs would be deterred from settling those aspects of the case that the parties were able to resolve for fear of losing their ability to effectively challenge the disputes that remained.

MHSAA's concern that allowing equal protection challenges to components of separate sex programs will result in lawsuits based on minor differences between programs is misplaced. It is only where, as here, similarly situated girls and boys are classified based on their sex and treated differently and harmfully for reasons that are not substantially related to any important government purpose that a violation of the Equal Protection Clause has been proven. See Pet. App. 30a ("The issue is not whether *any* difference between male and female high school sports is deserving of being classified as a case of disparate treatment. Rather, the issue is whether the seasonal scheduling differences on the basis of gender that result in unequal treatment of women in comparison to men is considered disparate treatment.").

The disparate impact cases MHSAA cites to argue that plaintiffs should have been required to show discriminatory animus are inapplicable because in those cases, the specific conduct challenged was found to be *facially neutral.* For example, in *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256 (1979), which challenged veterans' preferences, the Court found that status as a veteran was not a proxy for gender, since some men are not veterans and some women are. In such cases, the Constitution requires a showing of animus to determine "whether the adverse effect reflects invidious gender-based discrimination." *Id.* at 274; see also *Shaw* v. *Reno*, 509 U.S. 630, 649 (1993) (describing reapportionment legislation as race-neutral on its face).[12] In

[12] *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), cited by MHSAA to support its argument that its scheduling of girls' seasons is not a facial classification is also not relevant. Leaving aside the question of whether *Geduldig's* reasoning is still valid, in that case the Court held only that

contrast, the courts below agreed that the conduct challenged here—such as the decision that the girls' basketball season will be in the fall while the boys' season is in the winter—is an explicit classification based on sex.

MHSAA's claim that the Sixth Circuit's decision conflicts with *VMI* thus must be rejected. While MHSAA mischaracterizes *VMI* as deciding that separate but equal programs for males and females satisfy heightened scrutiny,[13] the critical points here are that the state has the burden of showing that challenged programs are substantially related to an important government purpose, and that separate and *unequal* programs for females are unconstitutional. See *VMI*, 518 U.S. at 553 (rejecting alternative program for women established by state because it was a "pale shadow" of *VMI*). The courts below found as a matter of fact that MHSAA's discriminatory scheduling of girls' and boys' seasons was *not* substantially related to an important government purpose. And, because MHSAA's scheduling of girls' seasons is manifestly unequal to its scheduling of boys' seasons for the multiple reasons found by the courts below, the Sixth Circuit correctly held that MHSAA's scheduling is unconstitutional. This decision in no way conflicts with *VMI*.

Finally, MHSAA erroneously claims that the Sixth Circuit deviated from *VMI* by requiring identical, rather than equal, treatment of boys and girls. See Pet. 21, 24. But neither the

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pregnancy-based distinctions were not explicit facial classifications. Here, MHSAA's scheduling decisions explicitly and on their face treat boys' and girls' teams differently.

[13] In fact, the Court did not address the argument that the Constitution permits "separate but equal" educational programming for male and female students. *See VMI*, 518 U.S. at 533 n.7. Noting but not deciding this question in evaluating Virginia's proposed remedy, the Court found instead that the Virginia Women's Institute for Leadership—the program established by the state as an alternative to admitting women to *VMI*—was manifestly unequal to VMI in both tangible and intangible benefits. *Id.* at 534, 547, 551, 557.

district court nor the Sixth Circuit in this case suggested that MHSAA must schedule girls' sports in seasons that mirror the boys' seasons. To the contrary, the district court repeatedly stated that MHSAA could schedule girls' and boys' sports in separate seasons as long as the sexes split advantageous and disadvantageous seasons equitably. See also Pet. App. 167a ("The parties are reminded that Defendant MHSAA may design the new schedule in a number of different ways, and as long as girls and boys share the advantages and disadvantages of the new seasons equitably, the Court will approve the Compliance Plan.").[14]

The trial court held, and the Sixth Circuit correctly affirmed, that in this case, similarly situated girls and boys were classified based on their sex and treated differently and harmfully in the scheduling of athletic seasons for reasons that are not substantially related to any important government purpose. This decision fully comports with this Court's jurisprudence.

2. *The Sixth Circuit's Decision Does Not Conflict With the Decisions of Other Courts of Appeals.*

There is no conflict between the Sixth Circuit's decision and the decisions of the Third, Fourth, Eighth, and D.C. Circuits that MHSAA cites. These cases are all readily distinguishable, and thus do not create any conflict.

First, there is no conflict between the Sixth Circuit's decision in this case and the Fourth Circuit's decision in *VMI*. In trying to demonstrate such a conflict, MHSAA repeats the same arguments it made to show a purported conflict with this Court's decision in *VMI*. Therefore, plaintiffs incorpo-

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[14] MHSAA's petition (p. 5 n.3) suggests that the district court specified a detailed scheduling remedy. In fact, MHSAA was provided an opportunity to design a constitutional schedule. *See* Pet. App. 166a-167a.

rate their responses to MHSAA's arguments. See *supra* at 14-20.

Second, there is no conflict with the Third Circuit's decision in *Vorchheimer* v. *School District*, 532 F.2d 880 (3rd Cir. 1976), *aff'd*, 430 U.S. 703 (1977), which held that a female high school student was not denied equal protection when she was denied admission to an all-male high school, because she could attend an allegedly equal girls' high school. *Vorchheimer* was decided before this Court's amplification of the proper scrutiny for such cases in *Mississippi University for Women* v. *Hogan*, 458 U.S. 718 (1982), and in any event is distinguishable. Unlike the separate female school that the Third Circuit found equal to the all-male school in that case, MHSAA's scheduling of girls' sports seasons here has been found *unequal* by the district court, a factual finding affirmed by the court of appeals.

Finally, MHSAA relies on three decisions by the Eighth and D.C. Circuits involving equal protection claims by female prisoners alleging discrimination in the provision of educational, employment, and other programs and services. But once again, there is no conflict. Initially, we note that the analysis in these cases (all decided before *Johnson* v. *California*, 543 U.S. 499 (2005)) is affected by this Court's decisions in *Turner* v. *Salfey*, 482 U.S. 78 (1987), and *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342 (1987), which held that prison regulations challenged as burdening constitutional rights are subject to only minimal constitutional scrutiny. See, *e.g.*, *Turner*, 482 U.S. at 81.

Moreover, in each of these cases, the relevant facts led the courts to conclude that the female and male inmates were not similarly situated as a threshold matter. Thus, the courts held that the plaintiffs in those cases did not have viable equal protection claims. See, *e.g.*, *Klinger* v. *Department of Corr.*, 31 F.3d 727, 731 (8th Cir. 1994) ("[d]issimilar treatment of dissimilarly situated persons does not violate equal protec-

tion"); *Keevan* v. *Smith*, 100 F.3d 644, 647-51 (8th Cir. 1996) (same). In this case, in contrast, female and male athletes in Michigan schools clearly are similarly situated, and thus entitled to equal treatment.

While *Klinger* and *Keevan* also held that there would be no equal protection violations even if the court assumed the female and male inmates were similarly situated, that was because they found that the prisoners were challenging *facially neutral rules*. See, *e.g.*, *Klinger*, 31 F.3d at 734 (no facial gender classification regarding 24-hour medical care where some male *and* female prisoners are deprived of this service); *Keevan*, 100 F.3d at 651 ("[w]hen attempts are made to compare programs offered at facilities housing inmates who are not similarly situated, 'it is hardly surprising, let alone evidence of discrimination, that the smaller correctional facility offered fewer programs than the larger one"). Here, both courts below rightly concluded that MHSAA's scheduling decisions facially classify athletes by gender. See Pet. App. 1a-2a.

Women Prisoners of the District of Columbia Department of Corrections v. *District of Columbia*, 93 F.3d 910 (D.C. Cir. 1996), is similarly inapposite. In that case, too, the court found that male and female inmates were not similarly situated. *Id.* at 924-27. In addition, the D.C. Circuit rejected female prisoners' claims that they were entitled to the *identical* programs offered to male prisoners. In this case, however, the court found that MHSAA's scheduling decisions treated boys and girls differently on their face, and that these differences resulted in significant harm to girls and were not substantially related to any important government interest.

In *VMI*, this Court made clear that a gender-based classification must be justified under the heightened scrutiny standard set forth in that case. In light of this Court's decision, there can be no conflict among the courts of appeals on this issue, and there is not.

II. THE COURT SHOULD NOT ADDRESS WHETHER TITLE IX IS THE EXCLUSIVE REMEDY FOR PLAINTIFFS' INJURIES IN THIS CASE.

A. This Case Is Not An Appropriate Vehicle To Address This Issue.

Plaintiffs do not dispute that when this Court decided *Rancho Palos*, there was a conflict among the courts of appeals on the question whether Title IX is the exclusive remedy for gender discrimination in athletic programs of federal fund recipients. This case, however, is the first to address the question since this Court decided *Rancho Palos*. Other courts of appeals have not yet had a chance to determine whether the directive of *Rancho Palos*—that § 1983 claims should be foreclosed only where there is compelling evidence of congressional intent to restrict plaintiffs to the remedies provided in the violated statute—requires a new analysis of the question whether Title IX provides the exclusive remedy for gender discrimination in this setting. It remains to be seen whether *Rancho Palos* will smooth away the conflict among the circuits on the issue.

In any event, for several additional reasons, this case should not be utilized to resolve the conflict that pre-existed *Rancho Palos*.

First, during nearly seven years of litigation, MHSAA never mentioned, let alone pressed, the question of whether Title IX provides the exclusive remedy for plaintiffs' claims. MHSAA's second petition to this Court, filed in 2005, is the first place that this argument arose, despite MHSAA's numerous dispositive motions and its 2000 petition to this Court seeking interlocutory review of a denial of summary judgment.

The reason for this omission is simple: Until it had no alternative litigation strategy, MHSAA consistently asserted

that it was not covered by, and thus did not have to comply with, Title IX. Once MHSAA lost this case at trial and on appeal, it sought an argument to try to bring the case to the attention of this Court. MHSAA decided to abandon its prior position that Title IX does not apply so that it could raise with the Court the conflict among the courts of appeals on the question whether Title IX is the exclusive remedy for gender discrimination in athletics at federally-funded institutions.

Plaintiffs respectfully submit that MHSAA should not be rewarded for this gamesmanship, and should not now be allowed to claim that Title IX is plaintiffs' only remedy, when it repeatedly argued that it was not subject to Title IX in the face of multiple rulings by the district court and Sixth Circuit to the contrary. Rather, these circumstances constitute a further reason why this Court should decline to review the exclusivity question. See *United States* v. *Ortiz*, 422 U.S. 891, 898 (1975) (declining to consider an issue raised for the first time in the petition for certiorari and on which petitioner took a contrary position below).

Second, as shown with regard to the equal protection issue, this Court should also decline review of the exclusivity issue because the answer to the question presented will not determine the outcome of this case. See *Monrosa*, 359 U.S. at 183. Deciding the exclusivity question presented by MHSAA would be similarly inconclusive because the district court held, and the court of appeals has affirmed, that MHSAA violated Title IX and Michigan state law. See *supra* at 2, 12-14.

Practices that deny equal opportunities in athletics to one gender violate Title IX, without regard to whether animus towards the disadvantaged gender is shown. See *supra* at 2, 13; see also *Pederson* v. *Louisiana State Univ.*, 213 F.3d 858, 881 (5th Cir. 2000) ("[the university] need not have intended to violate Title IX, but need only have intended to treat women

differently")[15]. The analysis in athletics cases thus focuses on whether males and females have been provided with equal participation opportunities, benefits, and services. *Cf. Policy Interpretation,* 44 Fed. Reg. at 71413 (describing multiple components involved in assessing Title IX compliance, one of which is scheduling, and stating that "[i]nstitutions will be in compliance if the compared program components are equivalent"). Therefore, even assuming MHSAA were correct that animus is required for violation of the Equal Protection Clause, there is no such requirement under Title IX.

This case is not a suitable vehicle to address whether Title IX is plaintiffs' exclusive remedy.

B. Title IX Does Not Provide the Exclusive Remedy for Plaintiffs' Claims.

MHSAA's argument that Title IX displaces plaintiffs' constitutional claim is, in any event, without merit.

This Court has made it clear that § 1983 is available as a remedy except in very narrow circumstances, none of which applies to Title IX. The Sixth Circuit reached the correct result using the analysis required by this Court in *Rancho Palos* and the cases upon which it relies, *Middlesex County Sewerage Authority* v. *National Sea Clammers*, 453 U.S. 1 (1981), and *Smith* v. *Robinson*, 468 U.S. 992 (1984), *superseded by statute*, Handicapped Children's Protection Act, 20 U.S.C. § 1415(e)(4)(B) (1985). As *Rancho Palos* explains, federal rights are presumptively enforceable under § 1983; this presumption may be defeated only in exceptional cases by showing that Congress intended to preclude § 1983 enforce-

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[15] Contrary to MHSAA's argument, the "intentional discrimination" discussed in *Pederson* is not the "animus" that is required to show a violation of the Equal Protection Clause for a neutral classification. That court's discussion of the archaic views of the university were not essential to its holding that the university had violated Title IX by not accommodating the interests of its female students in having more athletic teams.

ment. Evidence of congressional intent "may be found directly in the statute creating the right, or inferred from the statute's creation of a 'comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983.'" *Rancho Palos*, 544 U.S. at 120 (quoting *Blessing* v. *Freestone*, 520 U.S. 329, 341 (1997)). But *Rancho Palos* instructs that a § 1983 action is foreclosed only where there is clear congressional intent to restrict plaintiffs to the set of remedies that are available under the violated statute itself.

This is a demanding standard. In *Rancho Palos*, the Court barred reliance on § 1983 to enforce the Telecommunications Act of 1996 ("TCA") based on the detailed "scheme of expedited judicial review and limited remedies created by [the TCA itself]." 544 U.S. at 122-23, 127. That scheme mandates that judicial review be sought within 30 days of agency action and requires that the case be heard and decided on an expedited basis; it likely excludes compensatory damages and excludes attorneys' fees and costs; and the legislative history suggests that Congress intended the TCA to be an exclusive remedy. *Id.* at 129-30 (Stevens, J., concurring); See also *Smith*, 468 U.S. at 1011-1012 (foreclosing § 1983 action because it would "render superfluous" detailed procedural protections in statute and would frustrate Congress' view that needs of handicapped children are best met through parents and local education agency working together); *Sea Clammers*, 453 U.S. at 20 (foreclosing § 1983 action because statutes "contain unusually elaborate enforcement provisions, conferring authority to sue . . . both on government officials and private citizens").

The Sixth Circuit correctly applied *Rancho Palos* to conclude that Title IX does not provide the exclusive remedy for plaintiffs' claims. First, Title IX contains no express private remedies at all, and certainly has no restrictive remedies suggesting that Congress intended to preclude § 1983 enforcement. See *Rancho Palos*, 544 U.S. at 121 ("[w]e have found

§ 1983 unavailable to remedy violations of federal statutory rights in two cases: *Sea Clammers* and *Smith*. Both of those decisions rested upon the existence of more restrictive remedies provided in the violated statute itself.") (emphasis added); Pet. App. 22a (*Rancho Palos* "extend[s] only to statutes that contain an explicit private remedy that is sufficiently comprehensive . . . to infer that Congress intended the remedy to be exclusive") (emphasis added). Indeed, it was the absence of either a private remedy or a comprehensive enforcement scheme that led the Supreme Court to imply a private right of action to enforce Title IX. See *Cannon* v. *University of Chi.*, 441 U.S. 677, 705-706 (1979); see also *Franklin* v. *Gwinnett County Pub. Sch.*, 503 U.S. 60, 76 (1992) (finding private right of action for money damages under Title IX because administrative process would leave complainant "remediless").

Second, the availability of a private judicial remedy does not establish congressional intent to preclude § 1983 relief in any event. See *Rancho Palos*, 544 U.S. at 122 (refusing to adopt United States' position that availability of private judicial remedy conclusively establishes intent to preclude § 1983 relief); *ASW* v. *Oregon*, 424 F.3d 970, 977-78 (9th Cir. 2005) (citing *Rancho Palos* in holding that statute's provision of private judicial remedy does not establish intent to preclude § 1983 action and relying instead on statute's lack of comprehensive enforcement scheme), *cert. denied*, 127 S. Ct. 51 (2006). Rather, the question is whether the statutory scheme is "unusually comprehensive and exclusive" such that congressional intent to foreclose a § 1983 remedy can be inferred. *Rancho Palos*, 544 U.S. at 131 (Stevens, J., concurring).

Title IX does not meet this rigorous standard. The sole enforcement mechanism expressly authorized in the statute is the withdrawal of federal funds. 20 U.S.C. § 1682. While individuals may file administrative complaints, they are not

allowed to activate or participate in the investigation and are not entitled to individual relief. *Cannon*, 441 U.S. at 706-08 & n.41. This is not the kind of comprehensive enforcement scheme that this Court has held sufficient to foreclose a § 1983 action. Nor does Title IX's legislative history indicate that Congress intended to establish Title IX as an exclusive remedy for sex discrimination. See *Smith*, 468 U.S. at 1009-1012 (relying in part on statute's legislative history in foreclosing § 1983 action); *Blessing* v. *Freestone*, 520 U.S. 329, 346 (1997) (defendants must show congressional intent to preclude § 1983 claim).

Equally to the point, *Rancho Palos* and *Sea Clammers* are distinguishable from the instant case because they involved plaintiffs seeking to enforce federal *statutory* rights through § 1983. Plaintiffs here invoke § 1983 to enforce independent constitutional rights to equal protection. Although the plaintiffs in *Smith* sought to enforce their constitutional rights under § 1983, this Court found it critical that their § 1983 claims were "virtually identical" to their statutory claims (in addition to finding that Congress established a comprehensive enforcement scheme in the statute at issue). *Smith*, 468 U.S. at 1009. By contrast, plaintiffs' constitutional and statutory claims here are not identical for many reasons, including: (1) Title IX covers only entities receiving federal funds, while § 1983 covers all state actors; (2) conditions that violate the Constitution may not violate Title IX, see, *e.g.*, *Mississippi Univ. for Women*, 458 U.S. at 732-733 (striking down female-only nursing school policy under Equal Protection Clause, while noting that it might not violate Title IX); and (3) § 1983 allows recovery against individuals, see *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982), while most courts have held that Title IX does not. See, *e.g.*, *Lipsett* v. *Univ. of P.R.*, 864 F.2d 881, 901 (1st Cir. 1998) (damages under Title IX may be available only from educational institutions, not individuals). Moreover, in *Smith*, this Court was concerned that allowing a § 1983 action would provide plaintiffs with access to attor-

neys' fees, which were specifically omitted from the detailed remedial provisions of the statute at issue. [16] No such concern is present here.

Three circuits have held that Title IX precludes recovery under § 1983, but it is these courts, not this Court, that should revisit their precedent. Those decisions preceded, and do not reflect, the directive of *Rancho Palos*—that § 1983 claims are to be foreclosed only where there is compelling evidence of congressional intent to restrict plaintiffs to the remedies provided in the violated statute. For the reasons set forth above, Congress has manifested no such intent with regard to Title IX. Moreover, no court of appeals has relied on *Rancho Palos* to foreclose a § 1983 claim. The only circuit to address *Rancho Palos* authorized the § 1983 action to proceed. See *ASW* v. *Oregon*, 424 F.3d at 977-78 (availability of administrative review mechanisms and private judicial remedy does not preclude § 1983 action because statute lacks comprehensive enforcement scheme).

III. IN LIGHT OF THE DECISIONS BELOW, THE PETITION DOES NOT PRESENT ANY LEGAL ISSUE OF NATIONAL IMPORTANCE.

Given the factual findings of the decisions below, which simply apply this Court's established equal protection jurisprudence, MHSAA's petition does not present for this Court's review any issue of national importance. In fact, the only issue actually presented involves the application of *VMI* to the facts of this case—facts that are unique and unlikely to recur. Indeed, the underlying substance of the case is no longer of national importance, because, to plaintiffs' knowledge, MHSAA is the only state high school athletic associa-

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[16] Congress promptly responded to the ruling by amending the statute to more expressly state that it did not intend the statute at issue to displace any other remedies. *See supra* at 25.

tion in the nation that still schedules girls but not boys in disadvantageous athletic seasons.[17]

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[17] MHSAA claims, without citations, that girls' participation dropped when other states changed their athletics seasons. Just as the Court should not rely on the statement that MHSAA's scheduling of girls' sports in nontraditional seasons increased participation when that claim was expressly rejected by the district court, *see* Pet. App. 127a-131a, the Court also should not rely on MHSAA's claims about participation rates in other states when it cites nothing in support of its claims, let alone any record evidence or factual finding of the court below.